INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Dates of the judgment and application for appeal	1
Nature of the case	2
Cases believed to sustain jurisdiction	5
Appendix "A"—Decree, special findings of fact and conclusions of law	8
Appendix "B"—Dissenting opinion of Lindley, J.	14

Table of Cases Cited

Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1465	5, 6
Baltimore and Ohio Railroad Co. v. *U. S.*, 298 U. S. 349, 80 L. Ed. 1209	5
Bingaman v. *Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928	6
Buck v. *Kuykendall*, 287 U. S. 307, 69 L. Ed. 523	5, 6
Buder, In re, 271 U. S. 461, 70 L. Ed. 1036	6
Bush & Sons Co. v. *Maloy*, 267 U. S. 317, 69 L. Ed. 627	5
Clark v. *Poor*, 274 U. S. 854, 71 L. Ed. 1199	6
Continental Baking Co. v. *Woodring*, 256 U. S. 352, 72 L. Ed. 1155	6
Frost Trucking Co. v. *Railroad Comm.*, 271 U. S. 583, 70 L. Ed. 1101	5
Hoey v. *U. S.*, 308 U. S. 510	5
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551	6
Kroger Grocery and Baking Co. v. *Lewis*, 287 U. S. 9, 77 L. Ed. 135	6
Michigan Pub. Util. Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445	5
Morris v. *Duby*, 274 U. S. 135, 71 L. Ed. 966	6

Page

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975 5
Packard v. *Banton*, 264 U. S. 140, 68 L. Ed. 596 5
Shaffer v. *Carter*, 252 U. S. 37, 64 L. Ed. 445 5
Smith v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264 5
South Carolina State Highway Dept. v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 469 6
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322 6
St. Joseph Stockyards v. *U. S.*, 298 U. S. 38, 56 Sup. Ct. 120, 80 L. Ed. 1033 5
U. S. v. *Carolina Freight Carriers Corp.*, 315 U. S. 475 5
U. S. v. *Maher*, 307 U. S. 148 5

STATUTES CITED

Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, as amended by the Act of October 22, 1913, Chapter 32, 38 Stat. 220, Section 210 of the Judicial Code (28 U. S. C. A. 47a) 1
Constitution of the United States, Fifth Amendment .. 2
Interstate Commerce Act, Part I, Section 17(9), 54 Stat. 916, Section 205(g) of Part II of the Interstate Commerce Act, Acts of Congress of August 9, 1935, Ch. 498, 49 Stat. 548, and amended June 29, 1938, Ch. 811, Sections 507, 52 Stat. 1237 1238; United States Code, Title 49, Sec. 305(g), and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220 United States Code, Title 28, Secs. 41 (28), 43-48, 45a and 47a 2

BLEED THROUGH– POOR COPY

DISTRICT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. 881, Civil

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, A CORPORATION,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

JURISDICTIONAL STATEMENT

---

1. The jurisdiction of the Supreme Court of the United States to entertain this appeal is believed to be sustained by Act of Congress of March 3, 1911, Chapter 231, Sec. 210, 36 Stat. 1150, and by Act of Congress of October 22, 1913, Chapter 32, 38 Stat. 220, United States Code, Title 28, Sec. 47a, being Section 210 of Judicial Code.

2. The final judgment sought to be reviewed was entered in the above entitled action on August 14, 1947, and the application of plaintiff for appeal was presented on August 18, 1947.

3. This action does not involve the validity of any statute of any State or of any statute or treaty of the United States.

4. The nature of this case and action, the nature of the rulings of the court which were such as to bring this case within the jurisdictional provisions relied upon, a statement of the grounds upon which it is contended that the questions involved are substantial, and citations to the cases believed to sustain the jurisdiction, are next set forth under paragraphs hereof indicated (a), (b), (c) and (d), respectively, to-wit:

(a) Nature of the case.—The action, instituted January 8, 1945, in the District Court of the United States for the Southern District of Indiana, is one in which the plaintiff, Miami Transportation Company, Inc. of Indiana, an Indiana corporation, seeks to obtain interlocutory and permanent injunctions to vacate, set aside and enjoin the enforcement of a certain order of the Interstate Commerce Commission entered September 27, 1944, in its Docket No. MC 22305 entitled Lett & Company of Indiana, Incorporated, Common Carrier Application. The vacation of said order of the Interstate Commerce Commission and restraint of its enforcement are sought upon the grounds that said order deprives plaintiff of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States. This action arises under the Fifth Amendment to the Constitution of the United States, and under the laws of the United States, and more particularly under 54 Stat. 916, being Section 17 (9) of Part I of the Interstate Commerce Act, United States Code, Title 49, Sec. 17(9); and Section 205(g) of Part II of the Interstate Commerce Act (Acts of Congress August 9, 1935, Ch. 498, 49 Stat. 548, and amended June 29, 1938, Ch. 811, Sec. 507, 52 Stat. 1237, 1238; United States Code, Title 49, Sec. 305(g); and Act of Congress October 22, 1913, Ch. 32, 38 Stat. 219, 38 Stat. 220, United States Code, Title 28, Secs. 41(28), 43-48, 45a and 47a. Said applications for

BLEED THROUGH— POOR COPY

interlocutory and permanent injunctions were presented to the United States District Court for the Southern District of Indiana and to the Honorable Robert C. Baltzell, Judge thereof, who thereupon and conformably with the provisions of the Act of Congress of October 22, 1913, Ch. 32, 38 Stat. 220, called to his assistance to hear and determine said applications the Honorable Evan A. Evans, Circuit Judge, and the Honorable Walter C. Lindley, District Judge. Answers were filed by the defendants. The matter was set for trial in the United States District Court for the Southern District of Indiana on March 1, 1945. Before the trial and hearing was held, the defendant Commission reopened the case for reconsideration on the existing record, and hearing in the District Court set for March 1, 1945 was taken off the trial docket calendar by stipulation. Thereafter, the defendant Commission rescinded the order reopening the case on the existing record and reopened the proceedings limited solely to an inquiry concerning the relationship existing between Miami Transportation Company, an affiliated Ohio corporation. The relationship between these two companies had at all times been freely admitted by the plaintiff. Following these further proceedings no change of any kind was made by the Interstate Commerce Commission in its order of September 27, 1944 complained of in the original complaint filed in the District Court. On February 10, 1947 the plaintiff exhausted its remedies before the Interstate Commerce Commission when a final petition for reconsideration was denied. With the permission of the District Court, the plaintiff filed its supplemental complaint bringing down to date historically the proceedings in this case subsequent to March 1, 1945. Numerous extensions of the effective date of the order complained of were made by the Interstate Commerce Commission, the last extension expiring August 15, 1947.

On June 5, 1947 hearing on the merits and argument was had, and the case submitted to the district court. Briefs were filed by the parties, and on August 14, 1947 the district court filed its Special Findings of Fact and Conclusions of Law in this case, and entered a judgment that this cause be dismissed for want of equity, which findings of fact, conclusions of law and judgment are attached hereto and made a part hereof by reference. The decision of the court was made by the Honorable Evan A. Evans, Circuit Judge, and the Honorable Robert C. Baltzell, District Judge. The Honorable Walter C. Lindley, District Judge, dissented in part and concurred in part in a separate opinion, a copy of which is attached hereto, marked Appendix A, and made a part hereof by reference.

(b) The rulings of a majority of a Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon because said ruling dismissed the case for want of equity, and said final judgment of said court denied plaintiff a permanent injunction enjoining the enforcement of said order of the Interstate Commerce Commission approved September 27, 1944, entitled Lett & Company of Indiana, Incorporated, Common Carrier Application. In making its decision, the district court and the Interstate Commerce Commission failed to give any consideration whatsoever to more than 160,000 original shipping records and the testimony of officers and employees of plaintiff or its predecessor in interest, showing that the operations had been performed transporting commodities generally by motor vehicle in interstate and foreign commerce over the routes and in the territory involved, on, before and continuously since June 1, 1935.

(c) The questions involved are substantial in that the case involves the right of plaintiff to continue a lawful busi-

BLEED THROUGH– POOR COPY

ness which has been in continuous existence either as operated by plaintiff or its predecessor in interest since prior to June 1, 1935. The petition for appeal alleges that the gross revenue of plaintiff is approximately $500,000.00 a year, and that the value of the business is approximately $500,000.00, and that the plaintiff furnishes employment to approximately ninety employees. The cases showing the questions involved to be substantial are:

Michigan Pub. Util. Comm. v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;

Bush & Sons Co. v. *Maloy*, 267 U. S. 317, 69 L. Ed. 627;

Frost Trucking Co. v. *Railroad Com.*, 271 U. S. 585, 70 L. Ed. 1101;

Smith v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264;

Allen v. *Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.

(d) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to entertain this appeal are:

United States v. *Carolina Freight Carriers Corp.*, 315 U. S. 475;

Baltimore and Ohio R. Co. v. *United States* (1936), 298 U. S. 349, 80 L. Ed. 1209;

St. Joseph Stockyards v. *United States* (1936), 298 U. S. 38, 56 Sup. Ct. Rep. 120, 80 L. Ed. 1033;

United States v. *Maher*, 307 U. S. 148;

Hoey v. *United States*, 308 U. S. 510;

Shaffer v. *Carter*, 252 U. S. 37, 64 L. Ed. 445;

Packard v. *Banton*, 264 U. S. 140, 68 L. Ed. 596;

Pacific Tel. & Tel. Co. v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975;

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570, 69 L. Ed. 445;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623;
In re Buder, 271 U. S. 461, 70 L. Ed. 1036;
Interstate Busses Corp. v. *Holyoke Street R. Co.*, 273 U. S. 45, 71 L. Ed. 530;
Clark v. *Poor*, 274 U. S. 354, 71 L. Ed. 1199;
Morris v. *Duby*, 274 U. S. 135, 71 L. Ed. 966;
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245, 72 L. Ed. 551;
Continental Baking Co. v. *Woodring*, 286 U. S. 352, 76 L. Ed. 1155;
Kroger Grocery & Baking Co. v. *Lewis* (heard and reported with *Steward Dry Goods Co.* v. *Lewis*), 287 U. S. 9, 77 L. Ed. 135;
Allen v. *Galveston Truck Line Corporation*, 289 U. S. 708, 77 L. Ed. 1463;
Spielman Motor Sales Co. v. *Dodge*, 295 U. S. 89, 79 L. Ed. 1322;
Bingaman v. *Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928;
South Carolina State Highway Department v. *Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 469.

5. It is claimed that the majority of the Statutory Three-Judge Court abused its discretion in denying the permanent injunction aforementioned in that said court erred in refusing to give any consideration whatsoever to uncontradicted documentary evidence and uncontradicted oral evidence showing the plaintiff and its predecessor in interest had been in continuous operation over the routes and in the territory involved on, before and continuously since June 1, 1935. It is further claimed that the majority of the district court erred in finding that there was substantial evidence to sustain the order of the Interstate Commerce Commission when in fact there was no evidence whatsoever to sustain said order as to the routes and territory involved.

BLEED THROUGH– POOR COPY

6. The plaintiff appends hereto, marked "Appendix A," a copy of the Special Findings of Fact and Conclusions of Law and the Judgment of the majority of the Statutory Three-Judge Court dated, filed and entered August 14, 1947, which by the terms and provisions of the final judgment appealed from, constitutes the sole grounds for the court taking the action and making the rulings and decisions complained of upon this appeal. The plaintiff also appends hereto, marked "Appendix B," a copy of the separate opinion of District Judge Lindley, who dissented in part and concurred in part with the decision of the district court. No other opinions were issued in this case.

(Signed) Howell Ellis,
520 Illinois Building,
Indianapolis, Indiana,
Attorney for Plaintiff.

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. 881. Civil

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, a Corporation

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

Before the Honorable Evan A. Evans, Circuit Judge and the Honorable Robert C. Baltzell and Walter C. Lindley, District Judges

This cause coming on to be finally heard by the Court, and the parties appearing by their respective attorneys, and the Court having heard the evidence and argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are signed by the Honorable Evan A. Evans and the Honorable Robert C. Baltzell, and are ordered by the Court filed and made a part of the record in this cause, and the Honorable Walter C. Lindley now files herein his opinion, concurring in part and dissenting in part, which said opinion is ordered filed herein.

Upon the foregoing Special Findings of Fact and Conclusions of Law, it is now

Ordered, Adjudged and Decreed by the Court:

1. That the plaintiff's bill of complaint be, and the same is, hereby dismissed for want of equity.

2. That the defendants recover of and from the plaintiff their costs herein taxed at $——.

—— ——, Circuit Judge; —— ——, District Judge; —— ——, District Judge.

BLEED THROUGH– POOR COPY

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Civil Action No. 881

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, a Corporation

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION

Special Findings of Fact

Pursuant to Rule 52 of the Rules of Civil Procedure, the Court now states its Special Findings of Fact, as follows:

I

That this is a suit under Sections 41 to 48, inclusive, United States Code, Title 28, to set aside and annul an order of the Interstate Commerce Commission (hereinafter referred to as the Commission), dated September 27, 1944, in a proceeding entitled Lett & Company of Indiana, Incorporated, Common Carrier Application, Docket No. MC-22305; that the report and order also embraced Docket No. MC-52743 (Sub-No. 2), Miami Transportation Company, Inc., of Indiana, successor in part to Lett & Company of Indiana, Incorporated Common Carrier Application.

II

That on February 12, 1936, plaintiff's predecessor, Lett & Company of Indiana, Incorporated, filed an application with the Commission under Section 206(a) of the Interstate Commerce Act, Section 306(a) United States Code, Title 49; that by the application plaintiff's predecessor sought a "grandfather" certificate of public convenience and necessity authorizing continuance by it of operations in interstate or foreign commerce as a common carrier by motor vehicle of general commodities, with certain exceptions, between points in Indiana, Ohio, West Virginia, Pennsylvania, New York, Missouri, Virginia, North Carolina,

Illinois, Kentucky, Maryland, and the District of Columbia over regular and irregular routes; that numerous rail and motor carriers opposed the application. That a hearing was held by the Commission on the application and other proceedings and, that on September 23, 1940, the Commission entered an order granting the application in part and denying it in part.

III

That the applicant, Lett & Company of Indiana, Incorporated, filed its petition for rehearing on that part of the application which was denied by the order of September 23, 1940; that on January 17, 1941, the Commission entered an order reopening the case and specifically limiting the issues in the reopened proceedings to the transportation of general commodities over the following territory, to-wit:

Between Cincinnati, Ohio and Pittsburgh, Pa., over U. S. Highway 22, serving all intermediate points.

Between Cincinnati, Ohio and Pittsburgh, Pa., over Ohio Highway 4 from Cincinnati to Middletown, Ohio, thence Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus, Ohio, thence over Ohio Highway 16 to Coshocton, Ohio, thence over U. S. Highway 36 to Cadiz, thence over U. S. Highway 22 to Pittsburgh, Pa.

Between Cincinnati, Ohio and Pittsburgh, Pa., over U. S. Highway 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. Highway 19 to Morgantown, W. Va., thence over U. S. Highway 119 to Uniontown, Pa., thence over Pennsylvania Highway 51 to Pittsburgh, Pa., serving all intermediate points.

Between Delaware, Ohio and Portsmouth, Ohio, over U. S. Highway 23.

Between Charleston and Weirton, W. Va., over U. S. Highway 21 from Charleston to Parkersburg, thence over West Virginia Highway 2 to Weirton.

Between Indianapolis, Ind. and Cleveland, Ohio, over U. S. Highway 36 from Indianapolis to Pendleton, Ind.,

BLEED THROUGH– POOR COPY

thence over Indiana Highway 9 to Anderson, thence over Indiana Highway 32 to Muncie, Ind., thence over Indiana Highway 3 to Hartford City, Ind., thence over Indiana Highway 22 to Jonesboro, Ind., thence over U. S. Highway 35 to its junction with Indiana Highway 9, thence over Indiana Highway 9 to Huntington, Ind., thence over U. S. Highway 24 to New Haven, Ind., thence over U. S. Highways 30 and 30S to Mansfield, Ohio, thence over U. S. Highway 42 to Cleveland, Ohio.

Off-route service to all points in the St. Louis, Mo. commercial zone; all points in the Cincinnati, Ohio commercial zone; Speedway City and Fort Benjamin Harrison, Ind.; all points within 25 miles of Charleston, W. Va.; all points within 25 miles of Cleveland, Ohio; and all points within 35 miles of Pittsburgh, Pa.

That further hearings were held by the Commission on that portion of the application involved in the reopened case, and other proceedings had.

IV

That while the reopened proceedings were pending before the Commission, the original applicant, Lett & Company of Indiana, Incorporated, was declared bankrupt by the District Court of the United States for the Southern District of Ohio, Western Division, and Louis R. Schear was appointed operating trustee to continue the business.

V.

That arrangements were made to sell a part of the operating rights of Lett & Company of Indiana, Incorporated, to two other carriers, to-wit: Consolidated Forwarding Company, Inc., and Kenneth G. Foster, doing business as Foster Freight Lines; that the sale of a part of the operating rights to these carriers was approved by the Commission in its docket No. MC-F-1648, decided March 6, 1942. That in November, 1941, arrangements were made for the sale of the remaining portion of the operating rights of Lett & Company of Indiana, Incorporated, both confirmed and claimed, to the plaintiff, Miami Transportation Com-

pany, Inc. of Indiana; that this transaction was approved by the Commission in its docket No. MC-F-1719, decided May 30, 1942. That the plaintiff acquired all of the operating rights of Lett & Company of Indiana, Incorporated, involved in the reopened proceedings in Docket No. MC-22305 except off-route service to points in the St. Louis, Missouri commercial zone.

VI

That on May 22, 1943, the Commission issued its second report and order wherein it authorized operations similar to those granted in its first report and order of September 23, 1940; that this second order divided the operating authority in accordance with the respective shares of the three purchasers heretofore referred to. That as to the plaintiff, the authority to operate over one of the routes, viz., the route between Cincinnati, Ohio and Charleston, West Virginia, was granted only to the extent that this route was not already held by Miami Transportation Company of Ohio, an affiliated Ohio corporation; that the curtailment as to the authorization over this route was done for the purpose of eliminating duplicate operations by one transportation enterprise.

VII

That on November 26, 1943, a further hearing was held on the application for the purpose of affording the plaintiff an opportunity to submit additional proof; that no such evidence was submitted. That after further consideration the Commission issued its third report and order, dated September 27, 1944, which was attacked by the plaintiff in this suit.

VIII

That on July 6, 1945, a further hearing was had on the application for the purpose of determining whether the plaintiff and Miami Transportation Company of Ohio were commonly owned and controlled and whether the said companies were being conducted as one transportation business or as separate businesses; that as a result of this hearing, no change was made in the order of September 27, 1944.

BLEED THROUGH– POOR COPY

IX

That on January 8, 1945, the plaintiff filed its complaint in this court for an injunction against the enforcement of the order of September 27, 1944; that through a succession of orders the effective date of the order complained of has been extended by the Commission to August 15, 1947.

X

That there was substantial evidence to support the finding of the Commission that the plaintiff was not entitled to a certificate of public convenience and necessity authorizing operations over the routes denied to it by the order complained of.

XI

That there was substantial evidence to support the finding of the Commission that the plaintiff and Miami Transportation Company of Ohio were one transportation enterprise.

____ ____,
United States Circuit Judge, presiding

____ ____,
United States District Judge

____ ____,
United States District Judge

Dated this ____ day of _____, 1947.

Conclusions of Law

Upon the above and foregoing Special Findings of Fact, the Court now states its Conclusions of Law, as follows:

I

That there is substantial evidence to support the Commission's findings; that the order of the Commission, dated September 27, 1944, is not unlawful, arbitrary, capricious or discriminatory; that the law and the equities are with the

defendants; and that the complaint should be dismissed for want of equity.

II

That the defendants should recover of and from the plaintiff herein their costs taxed at $————.

——— ———,
United States Circuit Judge, presiding

——— ———,
United States District Judge

——— ———,
United States District Judge

Dated this —— day of ————, 1947.

APPENDIX "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

Civil Action No. 881

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, a corporation,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

LINDLEY, *District Judge*, concurring in part and dissenting in part:

Plaintiff sues under the Urgent Deficiencies Act, 28 U. S. C. sections 41 (28), 43-48, to set aside a portion of the order of the Interstate Commerce Commission dated September 27, 1944, under which the Commission authorized plaintiff, under the socalled "grandfather" clause of Sec-

BLEED THROUGH– POOR COPY

tion 206 (a) of the Interstate Commerce Act, to operate in interstate or foreign commerce, by motor vehicle over certain regular routes but denied wider authority to plaintiff in so far as it sought to operate on additional routes described as follows:

Route A, between Cincinnati and Pittsburgh, Pa., over U. S. Highway 22.

Route B, between Cincinnati and Pittsburgh, over Ohio Highway 4 to Middletown, Ohio, thence over Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus, thence over Ohio Highway 16 to Coschocton, Ohio, thence over U. S. Highway 36 to Cadiz, Ohio, and thence over U. S. Highway 22 to Pittsburgh.

Route C, between Cincinnati and Pittsburgh, over U. S. Highway 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. Highway 19 to Morgantown, W. Va., thence over U. S. Highway 119 to Uniontown, Pa., and thence over Pennsylvania Highway 51 to Pittsburgh.

Route D, between Delaware, Ohio, and Portsmouth, Ohio, over U. S. Highway 23.

Route E, between Charleston, W. Va., and Weirton, W. Va., over U. S. Highway 21 from Charleston to Parkersburg, W. Va., and thence over West Virginia Highway 2 to Weirton.

Route F, between Indianapolis and Cleveland, over U. S. Highway 36 from Indianapolis to Pendleton, Ind., thence over Indiana Highway 9 to Anderson, Ind., thence over Indiana Highway 32 to Muncie, Ind., thence over Indiana Highway 3 to Hartford City, Ind., thence over Indiana Highway 22 to Jonesboro, Ind., thence over U. S. Highway 35 to its junction with Indiana Highway 9, thence over Indiana Highway 9 to Huntington, Ind., thence over U. S. Highway 24 to New Haven, Ind., thence over U. S. Highway 30 and 30S to Mansfield, Ohio, and thence over U. S. Highway 42 to Cleveland.

Serving all intermediate points on the above described routes, and as off-route points Speedway City and Fort Benjamin Harrison, Ind.; all points in the Cincinnati commercial zone as defined in Cincinnati, Ohio Commercial Zone, 26 M. C. C. 49; all points within 25 miles of Cleveland; all points within 35 miles of Pittsburgh; and all points within 25 miles of Charleston.

Section 206 (a) provides that a common carrier by motor vehicle which engages in interstate commerce, shall procure from the Commission a certificate of public convenience and necessity for its operations, provided, however, that if any such carriers, or its predecessor in interest, was bona-fide in operation on June 1, 1935, over the routes for which application is made and has so operated since that time, the Commission shall issue its certificate without further proof that public convenience and necessity will be served by such operation. The Commission, in so far as it granted relief, found that plaintiff had brought itself within the statute by proving operations in 1935 and since, over certain specified routes, but concluded that as to the routes denied, plaintiff had failed to sustain the proof required by the statute.

Plaintiff complains because the Commission denied it the right to transport general commodities, except livestock, explosives, sand, gravel, coal and lumber, over the aforementioned refused routes, and to all intermediate points thereon. Its contentions are, first, that the Commission unlawfully, arbitrarily and capriciously denied plaintiff the right to operate over the routes mentioned, in view of alleged uncontroverted evidence of record showing that plaintiff had operated over the routes and in the territory involved on, before and continuously since June 1, 1935, and, second, that the Commission unlawfully, in its final order, deprived plaintiff of the right to operate on the Cincinnati-Charleston route previously granted.

Obviously, whether plaintiff and its predecessor used the routes in 1935 and continuously thereafter is a question of fact, no satisfactory disposition of which can be made until the evidence upon which plaintiff relies is scrutinized carefully in order to determine whether it was of such character

BLEED THROUGH– POOR COPY

as inevitably led to the conclusion that plaintiff urges. In other words, if the evidence before the Commission was controverted and that supporting the Commission's finding is substantial, we have no right to interfere; but if the evidence was of such character as to permit of only one conclusion, that is, that plaintiff has made uncontroverted proof of the use, then plaintiff is entitled to relief.

Plaintiff has submitted evidence of some 160,000 shipments of freight subsequent to 1935, which it claims passed over the routes involved, as proof of continuity of operation. All this evidence, it insists, the Commission ignored. In view of the fact that none of the parties has presented an analysis of the evidence, in so far as its applicability to the respective routes involved is concerned, I have found it necessary to formulate a rather laborious analysis myself. I shall briefly consider the evidence, thus analyzed and correlated, in so far as it is applicable to each of the respective routes.

In support of the use of Route A, exhibit 6 shows 5 shipments from McKeesport, in the neighborhood of Pittsburgh, to Circleville, 5 to Wilmington and 4 to Washington C. H., all Ohio towns on Route A; exhibits 4, 7A, sheet 29, shipment from Covington, Ky., just across the river from Cincinnati, to Zanesville, Ohio, on Route A; sheet 32, 2 shipments from Covington, Ky., to Steubenville, Ohio, on Route A; sheet 33, shipment from Chillicothe, Ohio, to Butler, Pa., which might have gone over Route D to Circleville and thence on Route A to Pittsburgh; sheet 33A, shipment from Covington to Cambridge on Route A and from Covington to Zanesville on Route A; sheet 50, shipment, from McKeesport, Pa., to Circleville, Ohio, and to Wilmington, Ohio, both on Route A; sheet 51, shipments from McKeesport to Washington C. H. and Circleville, Ohio, both on Route A; sheets 52, 53 and 4, shipments from Pittsburgh to Zanesville, Wilmington, Circleville and Washington C. H., on Route A and from Cincinnati to Zanesville, on Route A; sheets 56 and 63, shipments from Pittsburgh and McKeesport to Circleville, Washington C. H. and Wilmington, on Route A. Exhibits 6, 6A show 65 shipments from Pittsburgh and McKeesport, Pa., to Circleville, Wilmington and Washington

C. H., on Route A; exhibit 7, 7A and 72, innumerable shipments from Cincinnati and Pittsburgh, or towns within their zones, to many points on U. S. 22 on Route A, including 46 shipments to Washington C. H., 31 to Circleville and 2 to Wilmington.

In addition to these shipments similar others are disclosed in the multiplicity of exhibits. Plaintiff shows checking stations on Route A at Cincinnati, Ohio, and Washington C. H.

Robert C. Jones, manager and former truck driver of the company, testified that he was a truck driver for plaintiff and its predecessor from 1934 to 1940; that during and after the spring of 1935, he drove trucks every day from Cincinnati to Pittsburgh and return on U. S. 22, Route A.

As to Route B, which is an alternative route from Cincinnati to Pittsburgh, by way of Hamilton, Columbus, Coshocton and Cadiz, I find the following evidence: Exhibit 6 shows 11 shipments from McKeesport to Middletown, Ohio, on Route B; exhibit 6A shipments to Columbus, Ohio, on Route B; exhibit 7, sheet 2, shipments from Pittsburgh to Portsmouth, Ohio, which might have been sent over either Route B or C; exhibit 7A, sheet 34, shipments from Coshocton, Ohio, to Indianapolis, indicating use of Route B from Coshocton to Columbus; sheet 4, shipment from Newport, Ky., to Columbus, Ohio, on Route B; sheets 53, 58 and 60, shipments from Pittsburgh to Newark, Ohio, on Route B; exhibit 8, ten shipments of general commodities from Pittsburgh to Columbus, Ohio, on Route B, 10 shipments from McKeesport to Middletown on Route B and six shipments from Pittsburgh to Newark on Route B; exhibit 6, 4A, shipment from Newport to Middletown on Route B and shipments from Newport to Columbus on Route B; exhibit 6A, 45 shipments from McKeesport to Middletown on Route B and many shipments from the Pittsburgh zone to Columbus on Route B; exhibits 8, 8A, 8B and 8C, 175 shipments from Cincinnati to Middletown; 400 to Dayton; 50 to Springfield; 850 to Columbus, 60 to Newark, 10 to Coshocton, all on Route B, and hundreds of shipments originating beyond Cincinnati or Pittsburgh to points on Route B; exhibit 12, 15A, shipments from St. Louis to Springfield, Ohio, and 290 ship-

BLEED THROUGH– POOR COPY

ments from Springfield to Pittsburgh, which plaintiff claims shows proof of use of Route B. There is proof also of a checking point for Route B at Cincinnati and other evidence of shipments to points on Route B. Jones testified concerning Route B that he drove from Cincinnati on Highway 4 to Middletown, then on 73 to its junction with 25, thence on 25 to Dayton and that he drove from Cincinnati to Columbus, Coshocton and Cadiz, all on Route B.

As to Route C, which is another alternative route from Cincinnati to Pittsburgh over U. S. 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. 19 to Morgantown, W. Va., thence over U. S. 119 to Uniontown, Pa., and thence over Pennsylvania Highway 51 to Pittsburgh; exhibit 4 and 4A show shipments to Clarksburg, W. Va., and Parkersburg, W. Va., both on Route C; exhibit 7, sheet 2, shipment from Pittsburgh to Portsmouth, Ohio, which may have been part way by Route C, and shipment from Pittsburgh to Milford, Ohio, on Route C; exhibit 9, 53 shipments between Cincinnati and Parkersburg and Clarksburg, W. Va., on Route C; exhibit 9A, 2000 shipments from Cincinnati to Parkersburg on Route C; exhibits 11 and 11A some 350 shipments from Cincinnati to Wheeling, W. Va., indicating travel from Cincinnati to Parkersburg on Route C and then to Wheeling on Route E; exhibits 6, 4A, 24 shipments from Newport or Covington to Clarksburg or Parkersburg on Route C; two shipments from Norwood to Clarksburg; one from Cheviot to Clarksburg; four from Newport or Covington to Chillicothe, on Route C; exhibit 9, 450 shipments to Parkersburg, W. Va., and 250 shipments to Clarksburg, W. Va., originating either in Pittsburgh or Cincinnati and numerous shipments from points beyond Pittsburgh or Cincinnati to Parkersburg, Clarksburg and Chillicothe, which are on Route C; exhibit 11, 132 shipments from Cincinnati to Wheeling, W. Va., which may have traveled on Route C to Parkersburg and then on Route E to Wheeling.

There was evidence of other shipments which might have passed over Route C and evidence that plaintiff and its predecessor maintained checking stations at Cincinnati and Chillicothe. Jones testified that he traveled over Route C from Cincinnati to Parkersburg, W. Va., and Clarksburg, W. Va.

As to Route D, without discussing the evidence in detail, shipments were made, which plaintiff insists necessarily traveled over the route. It is possible that these shipments went along the route but there is nothing in the exhibits to show that such was the course. Indeed, in most cases, there is a much more direct route. Jones testified that he drove Highway 23 from Portsmouth to Delaware, Ohio. All in all, I agree that the evidence is too uncertain and conjectural in character to prove plaintiff's use of Route D.

As to Route E, plaintiff insists that shipments must have gone over the route. However, I agree that there is nothing other than conjectural evidence of use of the route. A checking station was maintained on Route E at Marietta, Ohio. There is no specific testimony on the part of Jones that he traveled on Route E but he did testify that he drove all the routes. I concur with the majority in the conclusion that the evidence is insufficient to prove use of Route E.

As to Route F, again I shall not prolong this memorandum by recital of all the evidence offered in support of its use, for I concede that the Commission was fully justified in its conclusion that the necessary proof had not been made.

On this analysis of the evidence I am convinced that plaintiff made a clear *prima facie* case under its application, in compliance with the statute, for the use of Routes A, B and C. The multiplicity of shipments to points on the respective routes, coupled with the direct oral testimony of the use of the specific routes being undenied. I think the Commission could not rightfully ignore the evidence and that, in the absence of any controverting facts, it follows that the order, in so far as it denied plaintiff's application with regard to Routes A, B and C, is not supported by substantial evidence. As to Routes D, E and F I agree that plaintiff failed to prove its averments and that, as to them, its complaint must be denied.

Plaintiff's further contention is that the Commission wrongfully excluded authorization of operations over a route between Cincinnati, Ohio, and Charleston, W. Va., which had been granted in an earlier order but which the

BLEED THROUGH– POOR COPY

Commission in the order now complained of took away from plaintiff. The Commission did this because it found that Miami (Ohio) and the present plaintiff were, at the time of proceedings being conducted as one transportation business and, inasmuch as it had previously granted authority to Miami (Ohio), it was thought best, in order to prevent duplication of service, to deny authority to plaintiff. Plaintiff does not deny that the two companies are commonly owned and operated.

The Commission's authority is defined in Rochester Telephone Co. *v.* U. S., 307 U. S. 125. The court has there limited the judicial function by saying that it is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. The Commission has in various cases defined fully its position that duplicate operating rights in identical parties are not to be granted. Greyhound Lines Common Carrier Application 41 M. C. C. 153; Pennsylvania Truck Lines, Inc., Common Carrier Application, 41 M. C. C. 607; C. A. Conklin Truck Line, Inc., Purchase, 37 M. C. C. 467; Savin Common Carrier Application, 41 M. C. C. 185; I Becker & Sons, Inc., 31 M. C. C. 623; Southwestern Transportation Company, Purchase, 35 M. C. C. 437, 442, 443; Elliott Bros. Truck Company *v.* U. S., 59 F. Supp. 328. Acting under its conception of the proper method of discharge of its functions, the Commission has established the rule forbidding duplication of authority. The evidence in this case plainly justifies application of the rule, unless it can be said, as a matter of law, that the rule is *per se* an improper one. I agree with the majority that we are not justified in making such an announcement. The Commission having found that the two companies were commonly owned; that authority had been granted to one of them and that the two companies were rendering one service, and having concluded, as a result, that it was beyond administrative wisdom to grant additional authority over this to the other of the commonly owned companies, I think, as the Supreme Court indicated in Rochester Telephone Co. *v.* United States, *supra*, to annul the action taken would be to travel beyond our proper judicial functions. Our only task is to discover whether there is a rational basis for

the conclusions approved by the administrative body and, having found that there is, we are powerless to substitute our judgment.

I conclude that the complaint should be denied as to all prayers for relief except as to that part of the order of the Commission which denied authority for use of routes A, B and C; and that as to that, plaintiff should prevail.

INDEX

Subject Index

		Page
I.	Statement of the Case	1
II.	The Proceedings before the Interstate Commerce Commission	3
III.	Appellees' Statement that Certain Operating Authority was Granted to Appellant by the Order Complained of is Erroneous	8
IV.	Appellees' Statement as to Appellant's Exhibits is Erroneous	10
V.	Appellees' Statement that this Case was Reopened by the Commission After the Order of May 22, 1943, "Solely to Afford Applicant an Opportunity to Submit Additional Proof" is Erroneous	12
VI.	Appellees' Statement that the only Question Arising on this Appeal "Relates to the Weight of the Evidence—" is Erroneous	13
VII.	Reference to one Assignment of Error by Appellant	15
VIII.	Conclusion	16
	Appendix	17

Table of Cases Cited

Page

Consolidated Forwarding Company, Inc., 38 M. C. C. 125 5

Lett & Company of Indiana, Inc., Common Carrier Application, 26 M. C. C. 159 3

Miami Transportation Company, Inc. of Indiana, 38 M. C. C. 805 5

National Labor Relations Board v. Goodyear Tire & Rubber Company, 129 Fed. (2d) 661, 665 (See 317 U. S. 622, 319 U. S. 776) 15

Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819 14

Statutes Cited

Interstate Commerce Act (49 U. S. C. 306 (a)) 2

BLEED THROUGH– POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. ————

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA,

Appellant,

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF OF APPELLANT, MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, IN OPPOSITION TO MOTION TO AFFIRM OF APPELLEES

I. STATEMENT OF THE CASE

This is an appeal from the final decree of a specially constituted three-judge court sitting as the United States District Court for the Southern District of Indiana. The court below dismissed appellant's complaint to set aside an order of the Interstate Commerce Commission denying to appellant, as a partial successor in interest to the original applicant, certain operating rights as a common carrier of commodities generally by motor vehicle in interstate commerce. The original application before the Com-

mission was under the provisions of the "grandfather" clause of the Motor Carrier Act of 1935, now Part II of the Interstate Commerce Act. (49 U. S. C. 306 (a).)

The decision of the court below was by a divided vote, District Judge Lindley filing a separate opinion in which he dissented, in part, from the decree entered. The dissent of Judge Lindley supports the position of appellant on the major questions raised by this appeal.

The appellees have filed a motion to affirm, which they state therein is submitted "pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States." This rule, as we read it, gives appellees the right to file such a motion in connection with a "statement disclosing any matter or ground making against the jurisdiction of this court asserted by appellant." We find nothing in said motion questioning the jurisdiction of this Court as asserted by appellant. Rather, the statement accompanying said motion appears directed to the proposition that "this appeal presents no substantial question." (Appellees motion, page 8.) This would seem to place the statement and motion in that class described by Rule 12, paragraph 1, relating to an appeal from a state court which, of course, is not applicable to the case at bar.

However, inasmuch as the statement and motion have been filed, we are submitting this brief pursuant to the provisions of Rule 7, paragraph 3.

It may be that the questions involved herein do not appear substantial to the Interstate Commerce Commission or to The United States of America, as represented by the Department of Justice. But the questions are very substantial to this appellant, involving as they do its very life or death as an operating motor carrier. The questions were substantial enough to win the support of District

BLEED THROUGH- POOR COPY

Judge Lindley, one of the three judges making up the court below, so that as to the real questions involved herein the appellees prevailed in the District court by a two-to-one vote. We hope to show to this Court, by this brief, that the questions involved herein are substantial, so this case may be decided upon its merits after full briefing and argument.

II. THE PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION

In order properly to understand the issues involved herein, in view of the statement and motion of appellees, we believe the proceedings before the Interstate Commerce Commission should be reviewed briefly.

The original applicant before the Interstate Commerce Commission was Lett & Company of Indiana, Incorporated, an Indiana corporation. This application was filed February 12, 1936, under the "grandfather" clause of the Act and applicant prayed the issuance of a certificate authorizing it to continue operations as a common carrier of commodities generally by motor vehicle, in interstate and foreign commerce, over the routes and in the territory where it was operating June 1, 1935 and continuously thereafter. Certain proceedings were had before the Commission and thereafter on September 23, 1940, in its docket number MC-22305, Lett & Company of Indiana, Incorporated, as reported at 26 MCC 159, the Commission entered an order granting, in part, and denying, in part, the original application.

Following this order Lett & Company of Indiana, Incorporated, filed a petition requesting reconsideration and further hearing solely as to the routes and territory denied in the order of September 23, 1940. On January 7, 1941,

the Commission granted said petition and reopened the case for further hearing *limited solely* to the routes and territory denied as a common carrier of commodities generally by the order of September 23, 1940, said routes and territory being set out with particularity in said order of January 7, 1941. Inasmuch as this order of January 7, 1941, becomes important, in view of certain erroneous allegations in the statement and motion of appellees, we are reproducing it in full in Appendix hereto.

Following said order reopening the case solely as to the routes and territory denied, hearings were held by the Commission as to these matters at Pittsburgh, Pennsylvania, on March 31, April 1, May 19 and 20, 1941, at which time Lett & Company of Indiana, Incorporated, submitted voluminous documentary evidence showing its operations over the routes and in the territory involved as of June 1, 1935, and continuously thereafter, said documentary evidence consisting of more than 166,000 freight bills, delivery receipts, bills of lading, and manifests, being original records of applicant which were brought to the hearing room. The applicant also prepared and provided printed and bound exhibits, in several hundred pages, listing and digesting said documentary evidence by routes and territory for the convenience of the Commission. This documentary evidence was supplemented by the testimony of officers and employees of the applicant, including testimony as to the actual driving of applicant's trucks transporting shipments over the routes and in the territory, on before and continuously after June 1, 1935. There was also submitted the testimony of certain shippers, many of them being nationally known and whose integrity and veracity stands unquestioned in this record, who had used applicant's service in the transportation of their commodities over the routes and in the territory involved in the

BLEED THROUGH– POOR COPY

reopened proceedings on, before and continuously after June 1, 1935. THERE WAS NO EVIDENCE CONTRADICTING THIS OVERWHELMING SHOWING MADE BY APPLICANT.

While this reopened proceedings was pending before the Commission, Lett & Company of Indiana, Incorporated, worn out financially by the long and costly proceedings before the Commission in its attempt to obtain what it considered to be its lawful operating rights, went into bankruptcy and was operated by a trustee pursuant to orders of the United States District Court for the Southern District of Ohio, Western Division. Said trustee in bankruptcy, with the approval of said court and of the Interstate Commerce Commission sold a portion of the operating rights of Lett & Company of Indiana, Incorporated, which had been permanently granted in the order of September 23, 1940, to Consolidated Forwarding Company, Inc., and to Kenneth G. Foster, as reported at 38 MCC 125. Said trustee, also with the necessary approval of the court and the Commission, sold a portion of the operating rights of Lett & Company of Indiana, Incorporated, permanently granted in the order of September 23, 1940, to appellant and also sold to appellant the claimed operating rights which had been the subject of the reopened proceedings heard at Pittsburgh and then pending before the Commission. 38 MCC 805.

On May 22, 1943, the Commission made an order as a result of the Pittsburgh hearings and denied appellant all of the routes and territory involved in the reopened proceedings. The order also took away from appellant a route between Cincinnati, Ohio, and Charleston, West Virginia, which was among those permanently granted in the order of September 23, 1940, and which was not even mentioned in the Pittsburgh hearings, because an affiliated

corporation of appellant held partially similar authority between these points. This latter matter was involved in the proceedings in the court below, but we assigned no error in connection therewith in this Court not because of any lack of faith in our contention, but because we did not deem the matter of sufficient importance to call to the attention of this Court. In our brief in the court below we indicated that this suit would never have been filed had the action of the Commission in reference to the Cincinnati-Charlestown situation been the only error in the order of the Commission. We mention this matter here now for two reasons. First, because appellees have seen fit to mention it in a foot-note at page 3 of their statement. Second, because it is necessary to refute an erroneous assertion contained in appellees' statement, which will be done elsewhere in this brief.

Following the order of May 22, 1943, appellant petitioned the Commission for reconsideration on the existing record, pointing out that the uncontroverted evidence before it had been disregarded. Instead the Commission ordered another hearing at Indianapolis, Indiana, which was not requested by appellant, and when the Commission was fully advised that all the available evidence was already before it.

The further hearing was held and appellant appeared and advised the Commission (of facts which it already knew) that the original applicant had been in bankruptcy; that appellant had acquired certain of the permanent and claimed operating rights of Lett & Company of Indiana, Incorporated, from the trustee with the approval of the court and the Commission; that all of the available evidence relating to operations of the original applicant in the reopened proceedings had been submitted at the Pittsburgh hearings; that the principal operating officer of the

BLEED THROUGH– POOR COPY

original applicant was in the South Pacific with the U. S. Marines, and that appellant desired the Commission to review the record made in the Pittsburgh hearings. In addition appellant submitted original shipping records and digests thereof showing continuous operation by appellant over the routes and in the territory involved in the reopened proceedings since the operating rights had been acquired by appellant.

On September 27, 1944, the Commission entered the order complained of in this case which also denied in toto the routes and territory involved in the reopened proceedings. A petition for reconsideration was denied by the Commission and the appellant, having exhausted its remedies before the Commission, on January 8, 1945, filed its complaint against the order of September 27, 1944, in the United States District Court for the Southern District of Indiana. The case was put on the trial calendar of the district court for March 1, 1945.

Before the trial and hearing could be held, the Commission entered an order *reopening the case for reconsideration on the existing record.* The case was taken off the trial calendar of the district court by a stipulation to this effect, but immediately after this was done the Commission rescinded its order reopening the case for reconsideration on the existing record and substituted, without the knowledge or consent of appellant, an order reopening the case solely to have another hearing on the question of the relationship of appellant and its affiliated corporation in connection with the Cincinnati-Charleston route only, a situation which had always been freely admitted and explained by appellant, the two corporations being necessary to comply with provisions of the Indiana law, not the Ohio law as erroneously stated in appellees' statement in the foot-note at page 2. This matter is not before this

Court since, as heretofore pointed out, we did not include it in our assignment of errors, but is mentioned here only to inform this Court as to what the Commission was doing during the period between March 1, 1945, when the case was taken off the trial docket of the district court by a stipulation of the parties, by reason of an order which was almost immediately repudiated by appellees, and the time the case actually was tried in 1947.

No affirmative action of any kind was taken by the Commission after March 1, 1945, although a hearing was held limited to the question of the relationship between appellant and its affiliate. A report was made, but no order. In an abundance of precaution, we asked for reconsideration of this report, so as certainly to exhaust our remedies before the Commission, and upon this being denied, the case was finally heard by the court below about two and one-half years after it was filed. This delay was not in the district court, but was occasioned by actions of the Interstate Commerce Commission. This resume of what occurred in connection with this case before the Interstate Commerce Commission may appear to be quite extended, but actually we have only referred to those matters necessary to reply to the appellees' statement. On brief, on the merits, if permitted to do so, we hope to be able to set out all that has occurred in connection with the proceedings before the Commission.

III. APPELLEES' STATEMENT THAT CERTAIN OPERATING AUTHORITY WAS GRANTED TO APPELLANT BY THE ORDER COMPLAINED OF IS ERRONEOUS.

In appellees' statement, at pages 1 and 2, we find the following:

BLEED THROUGH– POOR COPY

"The Commission's order, dated September 27, 1944, granted to appellant, as partial successor in interest to the original applicant, operating authority under the 'grandfather clause' of Section 206(a) of Part II of the Interstate Commerce Act as amended (49 U. S. C. 306(a)) as a common carrier of general commodities (with certain exceptions) over certain routes and of certain specified commodities from and to certain points; but denied authority to serve other territory included in the application."

In connection with the above quotation from appellees' statement we refer to a foot-note on the same page which reads in part, as follows:

"The authority granted is set forth in Appendix D to the Commission's report, reproduced in Appendix hereto."

Both what is said in the statement, as quoted, and in the foot-note, as quoted, is erroneous. We assume it is by inadvertence, by reason of the fact that counsel signing the statement of appellees have not to date, at least to our knowledge, been active in this case and may not be as well informed as those who have been associated with this proceeding since 1936. In any event, this assertion by appellees was one of those which caused us to review the proceedings before the Interstate Commerce Commission at some length so that the true facts may be known to this Court. The order complained of granted absolutely no authority to appellant. These statements of appellees appear to us to be intended to attempt to convince this Court that in the order complained of certain authority was granted and certain authority was denied and that this case may be described as involving an appeal from a partial grant and a partial denial of operating authority.

The order complained of, as we have attempted to make clear in this brief, in connection with our discussion of the proceedings before the Interstate Commerce Commission, denied in toto everything involved in the reopened proceedings and denied everything which was the subject of the Pittsburgh hearings. The authority set out in the

Appendix of appellees' brief, and which appellees claim in their statement was granted by the order complained of, was in fact permanently granted to Lett & Company of Indiana, Incorporated, in the order of September 23, 1940, and was in no way involved in the reopened proceedings as shown by the order of the Commission of January 7, 1941, reopening the case in court only, which is set out in the Appendix to this brief.

THIS CASE INVOLVES THE RECORD MADE AT THE PITTSBURGH HEARINGS AND NO AUTHORITY OF ANY KIND HAS BEEN GRANTED TO APPELLANT OR ANY ONE ELSE ON THE RECORD THERE MADE.

IV. APPELLEES' STATEMENT AS TO APPELLANT'S EXHIBITS IS ERRONEOUS

In this case the appellant has submitted exhibits, which were before the Interstate Commerce Commission, listing and digesting more than 116,000 shipments transported in interstate commerce by appellant's predecessor in interest Lett & Company of Indiana, Incorporated, over the routes and in the territory involved in the reopened proceedings and continuously thereafter until the operations were taken over by appellant. (There is no question here as to the appellant's continuation of the operations since it took over the operations with the approval of the court and the Commission.) There were other original records submitted which were not digested which bring the total to well over 166,000.

In appellees' statement, in connection with a discussion of this evidence and these exhibits, in a foot-note at page 7, we find the following statement:

> "Thus in the present case many of appellant's exhibits were merely lists of shipments claimed to have been made. Such lists, prepared by applicant for use at the hearing, have no greater probative value as proof that the shipments were in fact made than similar self-serving statements incorporated as allegations in the application itself would have. Only when and to

BLEED THROUGH– POOR COPY

the extent that they are supported by the underlying original documents of which they purport to be a convenient recapitulation do such lists have any evidentiary value."

There follows more which we will not quote verbatim to the effect that the Commission had tested these exhibits and found them wanting. Nothing could be farther from the fact.

All of the original records from which the exhibits were compiled for the convenience of the Commission, were brought to the hearing room in the Federal building in Pittsburgh. These records were available for inspection and were examined by some of the parties. *But as far as we know, and counsel preparing this brief was present and represented applicant at these hearings, no one from the Interstate Commerce Commission made even a perfunctory examination of them.* The records were brought to the hearing room in filing cabinets, carefully indexed in conformity with the exhibits, and were in charge of a staff of clerks familiar therewith and ready to assist anyone in examining the same. Yet, so far as we know, and we think we do know, no one from the Interstate Commerce Commission was interested enough to examine them. So we, at least, in view of our knowledge of the actual facts, do not attach much importance to this belated attack upon the authenticity of appellant's exhibits.

That there were a comparatively few, but not many, clerical errors in the exhibits prepared by Lett & Company of Indiana, Incorporated, and relied upon by appellant, has never been disputed. But these clerical errors are infinitesimal when compared with the number of shipments digested. That some errors should occur in a task of this magnitude certainly is not unusual, particularly when it is remembered that the case was reopened for the

purpose of taking this evidence on January 7, 1941, and the hearing ordered to begin on March 31, 1941, giving Lett & Company of Indiana, Incorporated, little enough time to complete compilations of this kind. Counsel preparing this brief knows that officials of the applicant and a staff of clerks worked night and day in the preparation of these exhibits after applicant was informed that it would be given an opportunity to present them.

V. APPELLEE'S STATEMENT THAT THIS CASE WAS REOPENED BY THE COMMISSION AFTER THE ORDER OF MAY 22, 1943, "SOLELY TO AFFORD APPLICANT AN OPPORTUNITY TO SUBMIT ADDITIONAL PROOF" IS ERRONEOUS.

In appellees' statement, at page 6, is the following:

> "Thereafter the proceedings were again reopened for further hearing 'solely to afford applicant an opportunity to submit additional proof so that a more accurate determination can be made of the claimed operations.' "

This statement refers to what transpired following the order of May 22, 1943, after the petition of appellant for reconsideration. We have heretofore pointed out that what appellant sought was reconsideration on the record made at Pittsburgh, because no other evidence was available as to the operations of Lett & Company of Indiana, Incorporated, a fact which we believe was well known to appellee, Interstate Commerce Commission. This further hearing was held, as we believe, to make some record as to the Cincinnati-Charleston route, upon which the Pittsburgh record was absolutely silent but which, although permanently granted to Lett & Company of Indiana, Incorporated, and sold to appellant, was taken away from appellant by the order of May 22, 1943, without any evidence on the subject, whatsoever. Our belief as to the purpose of

BLEED THROUGH– POOR COPY

this hearing is substantiated by what occurred after this suit was filed. As we have heretofore pointed out, after this case was set for trial in the district court, the Interstate Commerce Commission entered an order on its own motion, *reopening the case for reconsideration upon the existing record.* Immediately after the parties agreed to a stipulation taking the case off the trial calendar of the district court for this reason, the Interstate Commerce Commission rescinded its order reopening the case on the existing record and reopened it solely to investigate further, something which was never disputed, the relationship between appellant and its affiliated Ohio corporation.

What appellant and its predecessor in interest have been contending for since the Pittsburgh hearings is to have that record given proper or at least some consideration. As far as we know, and in this statement we are guided by our examination of the orders and opinions which have been entered by the Commission and the court below, Judge Lindley, as set out in his dissenting opinion, has made the first official analysis of the documentary and oral testimony submitted at the Pittsburgh hearing, since said hearing was held.

VI. APPELLEES' STATEMENT THAT THE ONLY QUESTION ARISING ON THIS APPEAL "RELATES TO THE WEIGHT OF THE EVIDENCE * * *" IS ERRONEOUS.

At page 2 of appellees' statement we find the following:

> "The only question arising on this appeal relates to the weight of the evidence."

This statement is erroneous. The position of appellees appears to be that even though there is absolutely no evidence contrary to that submitted by appellant or its predecessor in interest, that the Commission may totally disre-

gard this uncontradicted evidence under the guise of "weighing" the evidence. We have long disagreed with the position of the Interstate Commerce Commission, in this and many other cases, where it attempts to put itself in the role of a jury or judge of a trial court which has heard the evidence. As a matter of fact, in the case at bar, the members of the Interstate Commerce Commission who decided this case were as remote from the witnesses and their demeanor on the witness stand as Pittsburgh, Pennsylvania, is from Washington. It is true an examiner of the Commission did hear the case but we find nothing in his report concerning the demeanor of the witnesses on the stand.

But, however that may be, if the Commission, as it contends in this case, wants to place itself in the role of a jury or trial court in hearing this case, then it must be bound by all of the rules governing such jury or court and not just those which it pleases to adopt.

We are well aware of the fact that the rule as to trial courts and juries being the sole judge of the credibility of witnesses has been applied to the Commission. But this has been in cases where there was conflicting testimony. There is no question of credibility when the evidence and testimony is uncontroverted. Whenever, as in the case at bar, there is no evidence contradicting the documentary evidence and no testimony contradicting the testimony of responsible witnesses, then the Commission, as in the case of a trial court or jury, must follow that uncontradicted evidence.

This rule, as to a jury, was set out by this Court in Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819. This rule was applied to an administrative body by the United States Circuit Court of

BLEED THROUGH– POOR COPY

Appeals for the Fifth Circuit, in National Labor Relations Board v. Goodyear Tire & Rubber Company, 129 Fed. (2d) 661, 665. In that case, decided in 1942, the court said:

> "But it remains true that the discharger knows the real cause of discharge, it is a fact to which he may swear. *If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath can not be disregarded because there is a suspicion that he may be lying. There must be an impeachment of him, or substantial contradiction, or if the circumstances raise doubts, they must be inconsistent with positive sworn evidence on the exact point. This was squarely ruled as to a jury in Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, and the ruling is applicable to the board as a fact finder.*" (Emphasis supplied.)

The Decision of the Circuit Court of Appeals, in the case just cited, was taken to this Court on Certiorari, but the appeal was later dismissed. (See 317 U. S. 622; 319 U. S. 776). We do not believe that the Interstate Commerce Commission, in the case at bar can disregard the uncontroverted documentary evidence, the uncontroverted testimony of officers and employees of applicant, and the uncontroverted testimony of representatives of nationally known shippers, whose integrity and veracity is unquestioned in this record, merely because the Commission chooses to disbelieve such uncontradicted evidence and testimony. We believe that this situation presents a substantial question for decision by this Court, in spite of appellees' assertions that "this appeal presents no substantial question."

VII. REFERENCE TO ONE ASSIGNMENT OF ERROR BY APPELLANT

In connection with our contention that this appeal presents substantial questions for determination by this

Court, we respectfully call attention to our assignment of error numbered 2(e), in reference to the findings of the court below, where we alleged the court erred as follows:

"In determining and finding and stating, as its Special Finding of Fact No. X, and as the basis of its judgment herein, 'that there was substantial evidence to support the finding of the Commission that plaintiff was not entitled to a certificate of public convenience and necessity authorizing operation over the routes denied to it by the order complained of.'"

It is our contention, and we believe it presents a substantial question for determination by this Court, that there was no evidence and certainly not "substantial evidence," as found by the court below, to support the order of the Commission.

We challenge the appellees to show to this Court, on final hearing what the "substantial evidence" referred to by the court below consists of. We say there is none.

VIII. CONCLUSION

For the reasons set forth in this brief we respectfully request the Supreme Court of the United States to overrule the motion to affirm filed by appellees, to assume jurisdiction of this case so that it may be fully briefed and argued on its merits.

Respectfully submitted,

Howell Ellis,
520 Illinois Building,
Indianapolis, Indiana,
Counsel for Appellant.

BLEED THROUGH– POOR COPY

APPENDIX

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 7th day of January, A.D., 1941.

No. MC 22305

LETT AND COMPANY OF INDIANA, INCORPORATED

COMMON CARRIER APPLICATION
INDIANAPOLIS, INDIANA

Upon consideration of the record in the above-entitled matter and of applicant's petition for further hearing; and good cause appearing:

It is ordered, That said matter be, and it is hereby, reopened for further hearing, at a time and place to be hereafter fixed, with respect to applicant's right to continue operation as a carrier by motor vehicle as follows:

General Commodities, over the regular routes set forth in appendix B to the report entered in said matter on September 23, 1940, serving all intermediate points on such routes.

General Commodities, over a regular route between Cincinnati, Ohio and Pittsburgh, Pa., over U. S. Highway 22, serving all intermediate points.

General Commodities, over a regular route between Cincinnati, Ohio and Pittsburgh, Pa., over Ohio Highway 4 from Cincinnati to Middletown, Ohio, thence Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Colum-

bus, Ohio, thence over Ohio Highway 16 to Coshocton, Ohio, thence over U. S. Highway 36 to Cadiz, thence over U. S. Highway 22 to Pittsburgh, Pa.

General Commodities, between Cincinnati, Ohio, and Pittsburgh, Pa., over U. S. Highway 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. Highway 19, to Morgantown, W. Va., thence over U. S. Highway 119 to Uniontown, Pa., thence over Pennsylvania Highway 51 to Pittsburgh, Pa., serving all intermediate points.

General Commodities, between Delaware, Ohio, and Portsmouth, Ohio, over U. S. Highway 23.

General Commodities, between Charleston and Weirton, W. Va., over U. S. Highway 21 from Charleston to Parkersburg, thence over West Virginia Highway 2 to Weirton.

General Commodities, between Indianapolis, Ind., and Cleveland, Ohio, over U. S. Highway 36 from Indianapolis to Pendleton, Ind., thence over Indiana Highway 9 to Anderson, thence over Indiana Highway 32 to Muncie, Ind., thence over Highway 3 to Hartford City, Ind., thence over Indiana Highway 22 to Jonesboro, Ind., thence over U. S. Highway 35 to its junction with Indiana Highway 9, thence over Indiana Highway 9 to Huntington, Ind., thence over U. S. Highway 24 to New Haven, Ind., thence over U. S. Highways 30 and 30S to Mansfield, Ohio, thence over U. S. Highway 42 to Cleveland, Ohio.

Off-route service to all points in the St. Louis, Mo., commercial zone; all points in the Cincinnati, Ohio, commercial zone; Speedway City and Fort Benjamin Harrison, Ind.; all points within 25 miles of Charleston, W. Va.; all points within 25 miles of Cleveland, Ohio; and all points within 35 miles of Pittsburgh, Pa.

BLEED THROUGH– POOR COPY

It is further ordered, That the order entered in said matter September 23, 1940, which as thereafter modified denies a part of the application, effective February 14, 1941, be, and it is hereby, vacated and set aside only to the extent that it denies authority to continue the above-described operations.

By the Commission, division 5.

W. P. BARTEL,
Secretary.

(SEAL)

In the District Court of the United States for the Southern District of Indiana, Indianapolis Division

Civil Action No. 881

MIAMI TRANSPORTATION COMPANY, INC., OF INDIANA, A CORPORATION, PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] dated August 14, 1947, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

[1] The Court also made detailed findings of fact and conclusions of law, though writing no opinion. An opinion, concurring in part and dissenting in part, was filed by United States District Judge Lindley.

763209—47——1

Appeal was allowed on August 18, 1947, and appeal papers were served on August 22, 1947.

The Commission's order, dated September 27, 1944, granted to appellant, as partial successor in interest to the original applicant, operating authority under the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act as amended (49 U. S. C. 306 (a)) as a common carrier by motor vehicle of general commodities (with certain exceptions) over certain regular routes and of certain specified commodities from and to certain points; but denied authority to serve other territory[2] included in the application. Appellees submit that the appeal presents no substantial question, and that the decree of the District Court should be affirmed.

The only question arising on this appeal[3] relates to the weight of the evidence with respect to the geographical scope of the operations per-

[2] The authority granted is set forth in Appendix D to the Commission's report, reproduced in Appendix hereto. The authority claimed and denied is set forth in Appendix E to the Commission's report, reproduced in Appendix hereto.

[3] In the court below the question was also argued whether the Commission could eliminate duplications in operating authority granted, by excluding the authority already held by Miami Transportation Company of Ohio, an affiliated corporation admittedly under common control with appellant, and created merely for the purpose of complying with Ohio law regarding intrastate operations. The Court, following *Elliott* v. *United States*, 59 F. Supp. 328, 334–5 (D. Md., 1945), approved the Commission's course in eliminating such duplications in the certificate granted; and no error is assigned by appellant with respect to this determination.

BLEED THROUGH– POOR COPY

formed during the "grandfather" period. And the proposition is firmly established by a long line of authoritative judicial decisions that it is for the Commission to determine, upon weighing the evidence presented in an applicant's behalf, the precise scope of the geographical area which a motor carrier making application under the "grandfather clause" shall be authorized to serve.

In a leading case, *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 480–81, the Court, in sustaining geographical limitations imposed by the Commission under the "grandfather clause," said:

> The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission * * *. The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S. 263, 266. Substantial, as distinguished from incidental, sporadic, or infrequent, service is required. Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd 310 U. S. 609. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not

> have existed * * * While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service.[4]

It is also plain that an applicant claiming "grandfather" rights has the burden of proving his claim.[5] The "grandfather clause" confers a special privilege, which extends only to carriers plainly within its terms. *Gregg Cartage Company* v. *United States,* 316 U. S. 74, 83. As said in *Alton Railroad Company* v. *United States,* 315 U. S. 15, 25 "applicant carries the burden of establishing his right to the statutory grant."

It is well-settled that it is for the Commission to determine the weight and credibility of the evidence. *Otis Evans* v. *United States,* 329 U. S. 668.[6] More specifically, the rule is that the Com-

---

[4] Other recent decisions to the same effect include *United States* v. *Maher*, 307 U. S. 148; *Alton Railroad Company* v. *United States*, 315 U. S. 15, 24; *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401, 408; *Pyramid Moving Company* v. *United States*, 323 U. S. 811; *Turner* v. *United States*, 323 U. S. 674; *Alabama Highway Express, Inc.* v. *United States*, 325 U. S. 837; *Deaton Truck Line, Inc.* v. *United States*, 326 U. S. 680; *Howard Hall Company, Inc.* v. *United States*, 328 U. S. 18; *W. H. Tompkins* v. *United States*, 329 U. S. 683.

[5] *Akin* v. *United States*, 62 F. Supp. 391, 396 (W. D. La., 1945), aff'd 327 U. S. 766.

[6] To the same effect see *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475, 484, 490; *United States* v. *Pan American Petroleum Corporation*, 304 U. S. 156, 158; *B. & O. R. R. Co.* v. *United States*, 298 U. S. 349, 359; *Mer-*

BLEED THROUGH– POOR COPY

mission is not obliged to give credence to the vague and general assertions made by interested witnesses in their oral testimony. Thus in *Transamerican Freight Lines* v. *United States,* 51 F. Supp. 405, 410 (D. Del., 1943), the court said:

> Plaintiff's main complaint is that the Commission had no business to reject the uncontradicted testimony of Alfred Daniel—son of the applicant—to the effect that his father's operations continued without interruption until December 17, 1935. The Commission, as we have said, thought this testimony "vague and unsupported."
>
> But, this was still a factual decision. The issue of credibility is for the Commission, as it is for a jury. Or, as was said in *Loving* v. *United States,* D. C., 32 F. Supp. 464, 467, affirmed 310 U. S. 609, 60 S. Ct. 898, 84 L. Ed. 1387: "The hearing of evidence is an exclusive function of the Commission and it may disbelieve or disregard any evidence as it seems unconvincing; it may give as much or as little weight to evidence as it seems proper." The reason the fact-finding group—be it jury or administrative body—may reject uncontradicted

---

chants Warehouse Company v. *United States*, 283 U. S. 501, 508; *C. R. I. & P. Railway* v. *United States*. 274 U. S. 29, 33–34; *Assigned Car Cases*, 274 U. S. 564, 580; *Loving* v. *United States*, 32 F. Supp. 464, 467 (W. D. Okla., 1940), aff'd 310 U. S. 609; *Transamerican Freight Lines* v. *United States*, 51 F. Supp. 405, 410 (D. Del., 1943); *Fish Transport Company, Inc.* v. *United States* (D. Mass), decided December 22, 1944.

testimony is their belief in the improbability of the statements made, omissions in the account of the particular transaction, the conduct and manner of the utterer or his attempt to color the facts. *Quock Ting* v. *United States*, 140 U. S. 417, 420, 11 S. Ct. 733, 35 L. Ed. 501; *Fire Association of Philadelphia* v. *Weathered*, 5 Cir., 54 F. 2d 779; *American Casualty Co. of Reading* v. *Windham*, 4 Circ., 107 F. 2d 88; *Humphreys* v. *Commissioner*, 7 Circ., 125 F. 2d 340.

See also *Fish Transport Company* v. *United States* (D. Mass., Civil No. 3142), in an opinion rendered December 22, 1944.

The facts insofar as here pertinent and the basis for the Commission's decision are adequately stated in the following excerpts from the Commission's report. In its second report, dated May 22, 1943, the Commission said:

> Applicant is claiming the authority sought by reason of its alleged holding out to the general public to transport general commodities between the points in the territory applied for, and by reason of actual operations conducted by it since prior to June 1, 1935. In support of its claim it submitted at the further hearing exhibits on which are listed approximately 116,000 shipments, including a relisting of shipments submitted at the original hearing. In addition, several shippers testified in respect of the extent to which they had used applicant's service in the past.

BLEED THROUGH– POOR COPY

In the exhibits mentioned shipments are segregated according to the routes over which they were allegedly transported. In some instances, however, shipments listed as indicative of operation over a particular route obviously did not move over such route. In others, shipments shown moved only over an unspecified intermediate portion of the claimed route. Some shipments were interchanged with other carriers but the interchange points are not shown. In still other instances the same shipments are shown as indicative of operation over different routes.

As representative of the underlying documents from which the exhibits were compiled applicant submitted in evidence a group, selected at random, of truck manifests together with some delivery receipts. This evidence purportedly supports, as representative, the claimed route between Cincinnati and Pittsburgh, Pa., over Ohio Highway 4 from Cincinnati to Middletown, Ohio, thence over Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus, Ohio, thence over Ohio Highway 16 to Conshocton, Ohio, thence over U. S. Highway 36 to Cadiz, Ohio, and thence over U. S. Highway 22 to Pittsburgh. Neither the truck manifests nor delivery receipts show the actual route

traversed. The delivery receipts, however, show that 111 were issued at applicant's Indianapolis office and the remainder (3) at its Cincinnati office. The truck manifests likewise appear to have been issued at the respective offices of applicant. Consignees' signatures on the delivery receipts substantiate oral testimony that such documents accompanied the shipments to destination. An owner-operator of motor vehicles whose services applicant has used and applicant's vice-president testified that all applicant's traffic was transported over the most direct route between origin and destination unless the truck manifests indicated otherwise. Based on this premise that the shipments covered by the delivery receipts moved through Indianapolis or Cincinnati and thence over the most direct routes to destination, none of the underlying documents supports the claimed route. For example, of the 114 shipments covered by the delivery receipts 22 were from or to points applicant does not seek authority to serve; 42 moved to Dayton, presumably, as indicated by applicant's vice-president, over the direct route from Indianapolis east over U. S. Highway 40 to its junction with U. S. Highway 35, thence over the latter highway to Dayton, whereas the claimed route is from Cincinnati north to Dayton through Hamilton, and 27 shipments moved to Pittsburgh, from or through Indianapolis, and 4 in the reverse direction, all of which appear to have moved over routes

BLEED THROUGH– POOR COPY

other than those which they allegedly support. Many other irregularities are noted of which a shipment from Fairmont, W. Va., to Cincinnati is typical. This shipment is shown on a truck manifest as having been loaded at Indianapolis with three other shipments, one originating at Indianapolis, and the others at Lawrenceville, Ill. Destinations of these shipments are shown as Eaton, Hamilton, and Cincinnati, Ohio, and the truck was shown on the manifest to be loaded to these destinations in the same order. It is obvious therefrom that the route followed must have been from Indianapolis over U. S. Highway 40 to its junction with U. S. Highway 35, thence over U. S. Highway 35 to Eaton, and thence over U. S. Highway 127 to Hamilton and Cincinnati. Such a route is in its entirety west of the route the evidence was presented to support. The exhibits are replete with discrepancies such as are outlined above. The shipper testimony is very general. For the most part it reflects only transportation applicant was found entitled to perform in the prior report. In the case of widespread operations such as this where numerous regular and irregular routes are sought the data submitted in support of applicant's claims should be so arranged that shipments relied on in support of particular routes can readily be segregated and should be confined to shipments which actually moved over the particular routes claimed. Where a shipment moved over a portion

> only of a particular route, the specific portion should be indicated and where a shipment is listed in support of parts of two or more routes this fact also should be indicated. Notwithstanding the unsatisfactory nature thereof we have reviewed the entire record in the proceeding and are convinced no authority in addition to that granted in the prior report has been justified.

Thereafter, the proceedings were again reopened for further hearing "solely to afford applicant an opportunity to submit additional proof so that a more accurate determination can be made of the claimed operations." In the Commission's subsequent report of September 27, 1944, the Commission pointed out that plaintiff had failed to submit satisfactory proof.

> Miami's claim to the additional authority described in appendix E is based upon an alleged holding out by applicant to the public to transport general commodities, and on alleged actual operations under that holding out since a date prior to June 1, 1935. Its claims are supported by abstracts submitted in evidence at the prior hearing listing a large number of representative shipments purportedly transported by applicant on June 1, 1935, and until December 1941, and by shipper testimony in respect of the extent of the use of applicant's service in the past. In the prior report, we considered the evidence upon which Miami now relies to support its

BLEED THROUGH– POOR COPY

claims and found that because of irregularities and deficiencies in the evidence it provided no satisfactory basis for a conclusion that applicant was entitled to additional "grandfather" authority as claimed. Our conclusions respecting the probative value of the evidence were set out in detail in that report. Therein, among other things, we specifically pointed out that *the oral evidence was too general in character to support a finding that applicant was entitled to "grandfather" rights in excess of those granted, and that the documentary evidence was unsatisfactory in that shipments listed in abstracts as representative of operations over a particular route obviously did not move over such route, that other shipments were shown as moving over an unspecified intermediate portion of a claimed route, that some shipments were shown to have been interchanged with other carriers but that the interchange points were not shown, and that the same shipments were used to indicate operations over different claimed routes.* We also pointed out the manner in which the documentary evidence should have been assembled or arranged so that we might readily determine the route or routes over which particular shipments moved. In recognition of the unsatisfactory nature of the evidence, and upon consideration of the petition filed by Miami seeking reconsideration of the evidence submitted at the prior hearing, *we reopened the proceeding for further hearing*

for the specific purpose of affording applicant or Miami an opportunity to submit additional or clarifying evidence in support of present "grandfather" claims. No such evidence was submitted. Instead at the further hearing Miami submitted abstracts in evidence listing a large number of shipments transported by it during the period from December 17, 1941, to September 1, 1943. This evidence was submitted to show continuity of operation over the involved routes since their acquisition by Miami. *No oral or documentary evidence was presented by either applicant or Miami in respect of claimed operations on or prior to June 1, 1935, and counsel for applicant asserted that no such evidence was available.* [Italics supplied.]

The reviewing court, upon its examination of the record, approved the Commission's conclusions. The only issue raised by the appeal is one regarding the findings and inferences to be drawn, from the evidence of record, with respect to the scope of the geographical area where substantial service was rendered on the "grandfather" date. In cases of this type, sound public policy strongly supports the well established rule that determination of the weight and value of the evidence is a function entrusted to the Commission.

General statements by applicants and their employees are frequently offered in support of unduly broad and sweeping claims for operating authority as a motor carrier. Moreover, under

BLEED THROUGH– POOR COPY

the Commission's liberal rules of practice much evidence is often received which has little probative value.[7] It should be left to the experienced judgment of the Commission to determine in each instance what weight should be attributed to such testimony. In view of the fact that not only worthless but even spurious evidence[8] is often

[7] Thus in the present case many of appellant's exhibits were merely lists of shipments claimed to have been made. Such lists, prepared by applicant for use at the hearing have no greater probative value as proof that the shipments were in fact made than similar self-serving statements incorporated as allegations in the application itself would have. Only when and to the extent that they are supported by the underlying original documents of which they purport to be a convenient recapitulation do such lists have any evidentiary value. When tested by the Commission in the instant case, these compilations were found to be untrustworthy as proof of the facts in support of which they were offered. It is from such discredited exhibits that Judge Lindley in his partial dissent draws the basis for his opinion that three routes between Cincinnati and Pittsburgh should have been granted. But even if the references which he cites from such lists were accepted as trustworthy, they would fall short of constituting proof of shipments between those cities over the routes claimed. They cover nothing but movements to certain intermediate points. Judge Lindley's opinion that "if the evidence were of such character as to permit of only one conclusion" appellant would be entitled to relief as to these three routes thus rests ultimately on the testimony of one truck driver (Jones) that he drove trucks over one of these routes (U. S. 22) between Cincinnati and Pittsburgh. Appellees respectfully submit that no such conclusive effect can be given to the general statements made by this witness.

[8] Thus in *Otis Evans* v. *United States*, 65 F. Supp. 183 (W. D. Va., 1946), aff'd 329 U. S. 668, the District Court said: "The oral testimony of the applicant and his witnesses is generally vague and indefinite. As to his documentary evidence,

offered in such cases, it would be extremely unwise to depart from well established principles and adopt for appellant's benefit a new rule of law obliging the Commission to act favorably upon any application in support of which a witness can be found who is willing to testify in general terms in favor of the applicant.

Under well settled principles of law, expressing sound public policy, it is plain that the Commission's determination of the geographical scope of "grandfather" operations proved by appellant, such determination having been sustained on judicial review by the District Court, should not be disturbed on appeal.

For the foregoing reasons, it is clear that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(Signed) Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

(Signed) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

AUGUST 1947.

---

it is euphemistic to say that many irregularities appear therein." See also *Wright* v. *United States*, 50 F. Supp. 758 (W. D. N. C., 1943).

BLEED THROUGH— POOR COPY

APPENDIX

1. Operation authority granted, "Appendix D" to Commission's Report of September 27, 1944.

Authority granted in No. MC–52743 (Sub-No. 2).

1. General commodities, except livestock, explosives, sand, gravel, coal, and lumber.

Route A, between Indianapolis, Ind., and Cleveland, Ohio: Over U. S. Highway 40 to its junction with U. S. Highway 42 at Lafayette, Ohio, and thence over U. S. Highway 42 to Cleveland, and return serving the intermediate point of Richmond, Ind.

Alternate route: From the junction of U. S. Highways 40 and 42, at Lafayette, to Columbus over U. S. Highway 40, and thence to Cleveland over Ohio Highway 3 and return serving the intermediate point of Columbus.

Route B, between Cincinnati, Ohio and Charleston, W. Va.: Over U. S. Highway 52 to Huntington, W. Va., and thence over U. S. Highway 60 to Charleston and return serving the intermediate and off-route points of Portsmouth, New Boston, and Ironton, Ohio, Ashland, Ky., and Huntington, W. Va.

(Excepting to the extent that Miami Transportation Company (Ohio) is already authorized to perform identical transportation.)

2. Margarine.

Route A, from Columbus to Pittsburgh: From Columbus to Cambridge, Ohio, over U. S. Highway 40; thence to Pittsburgh over U. S. Highway 22; serving the intermediate point of Zanesville, Ohio.

Route B, from Charleston, W. Va., to Raleigh, N. C.: (1) From Charleston to Bluefield, W. Va., over U. S. Highway 21, through Princeton, W. Va., thence return to Princeton, W. Va., over U. S. Highway 21, thence to Rich Creek, Va., over U. S. Highway 219; thence to the junction of Virginia Highway 8 and U. S. Highway 11, over Virginia Highway 8; thence to Roanoke, Va., over U. S. Highway 11; thence to the junction of U. S. Highways 220 and 311 over U. S. Highway 220 through Ridgeway, Va., thence to Winston-Salem over U. S. Highway 311; thence to Greensboro, N. C., over U. S. Highway 421; and thence to Raleigh over U. S. Highway 70; also (s) from Ridgeway, Va., to Virginia-North Carolina State line over Virginia Highway 87; thence to the junction of U. S. Highways 158 and 29 over North Carolina Highway 87; thence to Greensboro over U. S. Highway 29; serving the intermediate points of Roanoke and Winston-Salem.

Route C, from Huntington and Charleston, W. Va., to Bluefield, W. Va.: (1) From Huntington to Bluefield over U. S. Highway 52; and (2) from Charleston, W. Va., over U. S. Highway 119 to its junction with U. S. Highway 52; thence to Bluefield as specified above, with no service at intermediate points.

Route D, from Cincinnati, Ohio to Wheeling, W. Va.: from Cincinnati to Clarksburg, W. Va., over U. S. Highway 50; thence to Fairmont, W. Va. over U. S. Highway 19; thence to Wheeling over U. S. Highway 250; serving the intermediate points of Fairmont, Clarksburg, Parkersburg, W. Va., and Athens, Ohio.

BLEED THROUGH- POOR COPY

Route E, from Cincinnati, Ohio to Pittsburgh, Pa.: from Cincinnati to Pittsburgh over U. S. Highway 22, with no service at intermediate points.

Route F, from Cincinnati, Ohio to Fort Wayne, Ind.: from Cincinnati over U. S. Highway 127 to Van Wert, Ohio; and thence to Fort Wayne over U. S. Highway 30, with no service at intermediate points.

Route G, from Charleston, W. Va., to Charlotte, N. C.: (1) From Charleston to Winston-Salem over margarine route B (1) of this appendix; and (2) from Winston-Salem over U. S. Highway 52 to Salisbury, N. C.; and thence over U. S. Highway 29 to Charlotte, with no service at intermediate points.

3. Petroleum Products (in containers)

Route A, from Pittsburgh, Pa. to Cincinnati, Ohio: Over U. S. Highway 22.

Route B, from Pittsburgh to Columbus, Ohio: over margarine route A of this appendix.

Route C, from Richmond, Ind. to Muncie, Ind.: Over U. S. Highway 35.

Service is not authorized at intermediate points on the above-described routes.

Route D, from Cincinnati to Lima, Ohio: Over U. S. Highway 25, serving the intermediate point of Dayton, Ohio.

Route E, from Cincinnati to Cleveland, Ohio: (1) from Cincinnati to Cleveland over U. S. Highway 42; and (2) from Cincinnati over U. S. Highway 42, and its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus; and thence over Ohio Highway 3 to Cleveland; serving the intermediate point of Columbus.

4. Floor Coverings:

Route A, from Cincinnati to Cleveland: over U. S. Highway 42.

Route B, from Cincinnati to Pittsburgh: From Cincinnati to Pittsburgh over margarine route E of this appendix.

Route C, from Cleveland to Buffalo, N. Y.: From Cleveland over U. S. Highway 20 to its junction with U. S. Highway 62; and thence over U. S. Highway 62 to Buffalo.

Route D, from Indianapolis, Ind. to Chicago, Ill.: From Indianapolis over U. S. Highway 52 to its junction with U. S. Highway 41; and thence over U. S. Highway 41 to Chicago.

Route E, from Charleston, W. Va., to Richmond, Va.: From Charleston to Roanoke over margarine route B (1) described above; thence to Lynchburg, Va., over U. S. Highway 460; thence to Amherst, Va. over U. S. Highway 29; and thence to Richmond over U. S. Highway 60.

Route F, from Charleston to Charlotte, N. C.: From Charleston to Winston-Salem, N. C., over margarine route B (1) described above; thence to Charlotte over margarine route G (2), described above.

Service is not authorized at intermediate points on the above-described routes.

5. Steel House Sections.

Route A, from Cincinnati to Cleveland: Over floor-covering route A, described above.

Route B, from Cleveland to Buffalo, N. Y.: From Cleveland to Buffalo over floor covering route C, described above.

Route C, from Cincinnati to McMechan, W. Va.: From Cincinnati to Fairmont, W. Va., over mar-

BLEED THROUGH– POOR COPY

garine route D, described above; and thence to McMechen over U. S. Highway 250.

Route D, from Cincinnati to Buckhannon, W. Va.: From Cincinnati to Clarksburg, W. Va., over U. S. Highway 50; and thence to Buchannon over West Virginia Highway 20.

Service is not authorized at intermediate points on the above-described routes.

2. Authority claimed by appellant but denied by Commission, "Appendix E" to Commission's Report of September 27, 1944:

General commodities except livestock, explosives, sand, gravel, coal and lumber.

Route A, between Cincinnati and Pittsburgh, Pa.: Over U. S. Highway 22.

Route B, between Cincinnati and Pittsburgh: Over Ohio Highway 4 to Middletown, Ohio, thence over Ohio Highway 73 to its junction with U. S. Highway 25, thence over U. S. Highway 25 to Dayton, Ohio, thence over Ohio Highway 4 to its junction with U. S. Highway 40, thence over U. S. Highway 40 to Columbus, thence over Ohio Highway 16 to Coshocton, Ohio, thence over U. S. Highway 36 to Cadiz, Ohio, and thence over U. S. Highway 22 to Pittsburgh.

Route C, between Cincinnati and Pittsburgh: Over U. S. Highway 50 from Cincinnati to Clarksburg, W. Va., thence over U. S. Highway 19 to Morgantown, W. Va., thence over U. S. Highway 119 to Uniontown, Pa., and thence over Pennsylvania Highway 51 to Pittsburgh.

Route D, between Delaware, Ohio, and Portsmouth, Ohio: Over U. S. Highway 23.

Route E, between Charleston, W. Va., and Weirton, W. Va.: Over U. S. Highway 21 from Charles-

ton to Parkersburg, W. Va., and thence over West Virginia Highway 2 to Weirton.

Route F, between Indianapolis and Cleveland: Over U. S. Highway 36 from Indianapolis to Pendleton, Ind., thence over Indiana Highway 9 to Anderson, Ind., thence over Indiana Highway 32 to Muncie, Ind., thence over Indiana Highway 3 to Hartford City, Ind., thence over Indiana Highway 22 to Jonesboro, Ind., thence over U. S. Highway 35 to its junction with Indiana Highway 9, thence over Indiana Highway 9 to Huntington, Ind., thence over U. S. Highway 24 to New Haven, Ind., thence over U. S. Highway 30 and 305 to Mansfield, Ohio, and thence over U. S. Highway 42 to Cleveland.

Serving all intermediate points on the above described routes, and as off-route points Speedway City and Fort Benjamin Harrison, Ind.; all points in the Cincinnati commercial zone as defined in *Cincinnati, Ohio Commercial Zone,* 26 M. C. C. 49; all points within 25 miles of Cleveland; all points within 35 miles of Pittsburgh; and all points within 25 miles of Charleston.

CERTIFICATE

This is to certify that I have served the foregoing "Motion to Affirm" on Miami Transportation Company, Inc., the plaintiff-appellant, by mailing a copy thereof to its attorney of record, Mr. Howell Ellis, at 520 Illinois Building, Indianapolis, Indiana, this 8th day of September, 1947.

(Signed) B. Howard Caughran,
B. Howard Caughran,
United States Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1947

BLEED THROUGH– POOR COPY

OCTOBER 27, 1947.

Per Curiam Decision.

No. 376. MIAMI TRANSPORTATION CO., INC. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Southern District of Indiana. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475. *Howell Ellis* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees.